

HONG KONG / JUDGMENT

HKSAR v. YIP CHI YUNG

COURT

Court of First Instance

DECIDED

24 January 2007

CASE / FILE NUMBER

HCMA212/2006

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Before: Deputy High Court Judge Line in Court Date of Hearing: 24 January 2007 Date of Judgment: 24 January 2007

J U D G M E N T

1. This is an appeal against a conviction for indecent assault.
2. The Appellant today appears before me having instructed solicitor and counsel. His counsel today was trial counsel. He tells me, very frankly, that in his view there are no arguable grounds that he can put before the court. It was clear that the Appellant, himself, wished to have the comfort of having counsel in court but present the case himself and I have allowed that to happen.
3. Accordingly, the Appellant has addressed me, very competently, on the basis of some perfected grounds of appeal, which run to four closely typed pages.
4. The Respondent s case was that the Appellant had indecently assaulted PW1 by touching her right buttock whilst she was on a walkway waiting for her boyfriend, who was PW2, to finish tying his shoelace and that she had grabbed the appellant s arm but he had broken away from her and run away so that they chased and caught him.
5. The Appellant s case was that he denied having deliberately touched PW1 at all and he thought that his bag may have accidentally brushed against her or, indeed, it could have been another pedestrian s bag that accidentally brushed against her. His case was that he had walked away from the incident because he was afraid of PW2 and that he later thought they might want to rob him.

6. A police officer was called when he was caught and arrested him and cautioned him for indecent assault, saying that the Appellant replied, I have nothing to say to you. You help me find my telephone. The Defendant denied saying the first part of that sentence but admitted saying the second part, it being his case that he had lost his telephone in the course of these events.
7. Ground 1 of the perfected grounds of appeal set out some 18 discrepancies. There is no need for me to repeat them because they are set out in writing. The question I have to ask myself is whether those matters, all taken together, raise any doubt about the reliability or credibility of the witnesses.
8. It is the case that the experienced trial Magistrate found PW1 and 2 to be honest, reliable and credible witnesses. In his careful statement of findings he sets out the main discrepancies and resolves them in a way which, in my judgment, is consistent with commonsense.
9. When two people are cross-examined closely about a moving event such as this there are bound to be discrepancies. It would be very odd if there were not. What tribunals of fact have to do is judge those in order to see whether or not they raise a doubt as to reliability or credibility. I have the benefit of a full transcript and my judgment coincides with the judgment of the Magistrate. This is not a case where those discrepancies can be said to have undermined PW1 and PW2 to an extent where they became unreliable.
10. It goes without saying that the Magistrate has the advantage over me of having seen and heard the witnesses. In saying that, it is not just a point about demeanour in the sense of how the witnesses looked or appeared, it relates to more than that because when a live witness gives evidence the tribunal of fact can judge many things, other than just how they look, from their evidence: their facility to describe the incidents, the sort of person they are, how they respond to the questions, the manner in which one can see their mental process engaging what the question meant and matters like that. The first instance judge has all the advantages of being able to appreciate the context in which matters such as discrepancy arise.
11. The second ground of appeal complains that the Magistrate did not sufficiently consider the inherent probabilities. He clearly did. He was alive to the issues and even if he did not, I do today. The ground also makes the further complaint that he rejected the Appellant's evidence that he had a mental problem. The Appellant had claimed at trial that his mental problems had meant that he was unable to speak at the time. It was that assertion of fact that the Magistrate rejected, he relying on evidence from the prosecution witnesses that, indeed, the Appellant had spoken.

12. A general practitioner had been called as a defence witness but was able to give admissible evidence that extended only as far as saying that she was aware of the history of his psychiatric disorder. There was no defence based on any disturbed mental state put forward as a substantive defence to the charge.
13. The ground also complained that the Magistrate allowed the prosecutor to cross-examine upon the Appellant's silence under caution. The relevant transcript is at page 83 of the bundle. There is nothing in the complaint because a reading of the transcript clearly discloses that the prosecutor was cross-examining on the basis that the remark about searching for the telephone was made to divert attention of the police officer. That was a legitimate exercise. There was no attempt by the prosecutor to ask the tribunal to draw an inference adverse to the Appellant from any silence and the Magistrate certainly did not do so.
14. The final matter that I need deal with arising from the perfected grounds is a claim that the Magistrate did not allow defence counsel to cross-examine about the relationship of PW1 and PW2, such as to suggest their fabrication of the charge against the Appellant.
15. Unlike the other matters referred to in the perfected grounds, there is no reference to the transcript in relation to this matter. I have looked carefully in the transcript for anything that could support such an assertion and there is nothing there.
16. Accordingly, this appeal against conviction is dismissed. I am sure on the evidence before me that the conviction is a proper one. There was no appeal against the Probation Order that was made. (P Line) Deputy High Court Judge Representations: Ms Olivia Tsang, Government Counsel of the Department of Justice, for the Respondent Mr Victor Ho Wai-kin, instructed by Lau Pau & Co., assigned by Director of Legal Aid, for the Appellant PAGE - PAGE - CRT3/24.1.2007/DB HCMA212/2006/Judgment A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V &`#\$ JUDGE.DOT setup Microsoft Word 9.0 Title Microsoft Word Document MSWordDoc Word.Document.8

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